In the

Supreme Court of the United States

October Term, 1977

No. 77-654

The Great Atlantic & Pacific Tea Company, Inc.,
Petitioner,

v.

Federal Trade Commission,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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Pursuant to Rule 24(4) of the Rules of this Court, The Great Atlantic & Pacific Tea Company, Inc. ("A&P") respectfully submits this reply to the brief of the Federal Trade Commission ("FTC" or "Commission") in opposition.

The FTC's brief is almost exclusively a zealous effort to minimize the importance of the questions raised by A&P's petition. Indeed, the Commission's brief even goes so far as to deny the existence of the basic issue raised by the court of appeals itself when it ruled:

"the Commission did not itself submit a cost study to show the absence of cost justification. A finding of §2(f) liability, therefore, has been arrived at with-

out a square holding as to the factual absence of cost justification." (Pet. App. 24a-25a)[1]

There is simply no support for the FTC's assertions that the issues raised in A&P's petition are unimportant and arise infrequently (FTC Br. 7). To the contrary, in the everyday world wholesale buyers like A&P (who must deal with thousands of sellers and can have only the vaguest notion of their costs) are the public's main line of defense in the battle against rising prices. To deprive such buyers of their right to bargain (or to force them to accept unverifiable statements concerning costs, made by salesmen anxious to get the highest possible price) would be to substantially impair this line of defense. Thus, the petition raises significant and recurring questions of critical importance not only to American businessmen but to the public at large.

I.

The Meeting Competition Defense Should Have Been Available to A&P.

A&P does not seek to change the balance struck by the Robinson-Patman Act (FTC Br. 15), but only to have the Act construed in the light of commercial realities recognized by the Commission itself in this very case when it found that no unfair trade practice had occurred here (see Pet. 11-14). In contrast, the FTC's brief ignores the petitioner's first argument based on that ruling (*i.e.,* that the decision below would require buyers to restrict their bargaining contrary to the public interest) and proceeds

[1] "Pet." refers to A&P's Petition for a Writ of Certiorari, "Pet. App." to the Appendices to A&P's Petition, and "JA" to the Joint Appendix filed with the court below, a copy of which has been lodged with this Court.

instead to assert that A&P was properly deprived of the "meeting competition" defense.

In doing so, the Commission does not quarrel with A&P's authorities holding that a seller may "beat" the competitive price without losing the meeting competition defense (Pet. 16-17). It states: "Those decisions simply recognize that, as a practical matter, a seller seeking to meet a competitor's undisclosed bid cannot be expected to duplicate that bid in every detail" (FTC Br. 10). The Commission contends, however, that A&P cannot avail itself of the meeting competition defense because "Borden's offer was much more than a marginal improvement on Bowman's" (FTC Br. 11).

At the same time, the Commission concedes the accuracy of the prices quoted at page 7 of the petition, which shows that the difference between the competitive offers was only fractions of mills or no more than ⅓ of 1%. Instead, the FTC asserts: "When the per unit differences are multiplied by the millions of units sold throughout the area embraced by A&P's Chicago Division, the resulting dollar differences are substantial—amounting to around $83,000 annually . . ." (FTC Br. 9, n.9). While the $83,000 figure is inflated, even $83,000 would be less than 1½% of the over $5,600,000 A&P was then paying Borden annually merely for the 11 products to be furnished in private label.[2]

Further, the Commission's insistence on aggregating the admittedly miniscule unit price differences penalizes the large buyer for no reason other than its size. According to this reasoning (adopted by the court below), a

[2] We have previously pointed out (Pet. 4, n.4) that A&P never realized the $83,000 Borden had predicted, but even 1½% can hardly be described as "substantial" when Borden and Bowman offered discounts of 26% and more to all volume customers (JA 3571-73, 3580).

large buyer could never avail itself of the meeting competition defense unless the winning bid happened to match exactly the competing bid—down to the fraction of a mill. We submit that such a result cannot be reconciled with judicial precedents or commercial practicalities.

This Court in *FTC* v. *A.E. Staley Mfg. Co.*, 324 U.S. 746 (1945), held that a seller who "beat" a competitor's price did not lose the meeting competition defense provided that the seller showed "that the price was made in good faith to meet a competitor's . . ." (p. 759). *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971), would at most extend to buyers a "good faith" acceptance requirement comparable to the "good faith" required of sellers by *Staley*.[3]

Here, A&P has been exonerated of any charge of unfairness or bad faith on the undisputed facts. Borden would not provide any customer with details as to its costs or its dealings with other customers. A&P received a bid from Borden that offered it estimated annual savings of $410,000, and then a bid from Bowman offering savings of over $737,000. Borden then offered estimated savings of $820,000, stating it was doing so to meet competition.[4] In accepting the bid, A&P asked Borden to make these prices available to other customers, and Borden replied that

[3] This is clear from the crucial portion of the *Kroger* ruling omitted from the FTC brief:

> "The controlling point here is not the 'hard bargaining' nor the 'price levels' but the *misrepresentation* of the [competitor's] bid, in order to induce a discriminatory price." (438 F.2d at 1378, emphasis in original)

[4] The FTC's reference to "somewhat further" reductions (beyond $820,000) in Borden's prices resulting from a "sharpen your pencil" remark (FTC Br. 3) is misleading. Borden's first response to the opportunity to submit a second bid was to offer savings of $820,000, and that amount remained the same through two successive proposals in which these total savings were allocated to the specific products (JA 1721-1722, 1777, 1896, 3419-3420, 3445-3446, 3477-3478, 3481-3482).

its prices were proper and it was prepared to defend them.

This is not a case, as the FTC's brief implies, of a dominant buyer forcing a supplier to discriminate against the buyer's competitors. The supplier here was more powerful than A&P, which could find only one other dairy willing to bid on its business. Even in such circumstances, the decision below would put on the buyer the duty of either refusing the better offer, or advising the offeror that he may raise his offer to his competitor's level (Pet. 12). This result was expressly rejected by the Commission in dismissing the FTC Act charge against A&P, but the FTC's brief now tells this Court that the buyer must refuse the offer if it is more than a "marginal improvement" over the competitive offer. That suggestion (in the context of offers that were not even one mill apart) underscores the importance of resolving this basic question concerning a buyer's freedom to bargain.

II.

The Commission Failed to Show a Lack of Cost Justification as Required by *Automatic Canteen*.

A&P's petition pointed out that the court below failed to follow this Court's decision in *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61 (1953), in a case where the buyer was served by different methods than his competitors, by failing to require a showing of lack of cost justification as well as the buyer's knowledge of that fact. The court below agreed with A&P as to the absence of any showing of cost justification, stating: "A finding of § 2(f) liability, therefore, has been arrived at without a square holding as to the factual absence of cost justification" (Pet. App. 24a-25a).

Shunning any attempt to justify this acknowledged departure from *Automatic Canteen,* the FTC's brief contends that the question is academic because the court of appeals was in error in admitting "the factual absence of cost justification" (FTC Br. 14 n.16). It asserts that the Commission found a lack of cost justification by adopting the administrative law judge's finding to that effect (FTC Br. 14 & n.16). The record references cited are to findings by the administrative law judge (JA 949-950) and to the portion of the Commission's opinion adopting his findings "except as qualified or altered by this opinion" (JA 1023).

The FTC's brief overlooks the fact that the Commission specifically "qualified or altered" the very findings on which the brief relies. The administrative law judge's findings in issue (JA 949-950) were based on data prepared by Malone, a Borden accountant, during the Borden-A&P negotiations. These Malone figures were the *only* evidence adduced as to lack of cost justification. The Commission stated that this Malone data "may not be completely accurate" (Pet. App. 50a), and ruled that it did not demonstrate absence of cost justification (Pet. App. 51a, n.25).

Since there is nothing in this record which could possibly support a finding of absence of cost justification, the court below was correct in its conclusion that § 2(f) liability was imposed "without a square holding as to the factual absence of cost justification". Recognizing this, the court ruled that *Automatic Canteen* should not be read to impose any such burden on the FTC.[5] It is this ruling which is challenged in our petition (at pp. 17-20) and which the opposition brief seeks to sidestep without any citation of authority other than the *Fred Meyer* case (dealt with at Pet. 19).

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[5] In contrast, the FTC's brief (*e.g.*, in the second "question presented" at p. 2) not only acknowledges this burden but assumes that it has been met.

The record is clear that the methods of service between A&P and its competitors differed.[6] In such a situation, *Automatic Canteen* required the FTC to show (i) "that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential", and (ii) "that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings" (346 U.S. at 80). The court of appeals acknowledged that the first showing was not made and its ruling that the second requirement was nevertheless satisfied is simply incongruous.

Finally, it should be noted that the FTC's brief states that *after* the reduced service-private label arrangement between A&P and Borden commenced, Borden offered similar (though not identical) reduced-service arrangements to its other customers without a comparable price reduction (FTC Br. 4-5).[7] This argument assumes that even if the discounts were initially cost justified, the supplier could force a buyer to accept a higher price by such subsequent

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[6] The FTC brief (at p. 13) claims that the service differences were "often minimal", improperly paraphrasing a portion of the Commission's opinion. The Commission, in referring to certain price comparisons prepared by an FTC accountant to show price discrimination, stated: "although there were differences in the way A&P and its competitors were served, the distinctions were often minimal and, in any event, are more properly considered in connection with the cost justification defense" (Pet. App. 41a). It is precisely in connection with this defense that service distinctions, minimal or otherwise, bring into play the two-pronged requirement of *Automatic Canteen* for a showing of a lack of cost justification *and* knowledge of such lack by the buyer. The opposition brief's attempt to convert the quoted language into a finding of no cost justification is another misuse of the "Malone data" discussed above (FTC Br. 13, n.13).

[7] The record indicates that none of the seven Borden customers who were called as witnesses by FTC counsel supporting the complaint to show discrimination chose this reduced service (JA 1104-1105, 1136, 1359-1360, 1467, 1512-1513, 1596, 6389-6390).

conduct. That result would not only be inflationary but unfair. If a supplier wishes to eliminate services, he should reduce his prices to all customers to the same level. If instead he charges different prices without cost justification, that is not an abuse of buyer power, but irresponsible selling.

CONCLUSION

For the reasons stated herein and in the petition, it is respectfully requested that this Court issue a writ of certiorari to review the decision below.

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